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ROBERT W. FINNERTY

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

GIRARDI KEESE,

Debtor

Case No. 2:20-bk-21022-BR

Chapter 7

**OBJECTION TO CHAPTER 7
TRUSTEE'S APPLICATION TO
EXPAND SCOPE OF SERVICES OF
SPECIAL LITIGATION COUNSEL,
LARRY W. GABRIEL, THE LAW
OFFICES OF JENKINS, MULLIGAN &
GABRIEL, LLP; JOINDER IN
OBJECTIONS OF CALIFORNIA
ATTORNEY LENDING II, INC. AND
STILLWELL MADISON LLC;
REQUEST FOR HEARING**

**Date: TBD
Time: TBD
Place: Courtroom 1668**

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A LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW
ONE CALIFORNIA PLAZA
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On February 15, 2022, Elissa D. Miller (the “Trustee”) filed the “Chapter 7 Trustee’s Application to Expand Scope of Services of Special Litigation Counsel, Larry W. Gabriel, The Law Offices of Jenkins, Mulligan & Gabriel, LLP” (the “Application”). (Docket no. 1018.)

Abir Cohen Treyzon Salo, LLP (“ACTS”), 1126 Wilshire Partnership, and Robert W. Finnerty (together, the “Objecting Creditors”) filed timely proofs of claim in the Chapter 7 case of Girardi Keese (the “Debtor”). Those claims have not been objected to. As such, they are “deemed allowed” pursuant to 11 U.S.C. § 502(a).¹

The Objecting Creditors oppose the Application because the Trustee has not demonstrated the need to hire another law firm to investigate and prosecute potential claims and because the proposed hybrid fee structure is ambiguous and unreasonable.

Further, the Objecting Creditors also wish to clarify that the phrase “Debtor’s former...outside counsel,” as used in the Application, means attorneys who previously provided legal services to the Debtor, rather than the Debtor’s former co-counsel.

II. ARGUMENT

The Objecting Creditors object to the Application for five reasons.

First, the investigation of potential claims against the Debtor’s former lenders, accountants and counsel already is within the scope of the employment of the Trustee’s counsel and accountants, as the Objection of California Attorney Lending II, Inc. (“CAL II”) explains. (Docket no. 1032.) The Trustee already has hired the law firm of Smiley Wang-Ekvall, LLP as general counsel to investigate and prosecute claims. (Docket no. 59.) The Trustee also has hired the law firm of SulmeyerKupetz, A Professional Corporation, as special avoidance power litigation counsel, which presumably will handle any fraudulent and preferential transfer litigation against the Debtor’s former lenders, accountants and outside counsel. (Docket no. 820.) She also has hired a forensic accounting and financial advisory group named Development

¹ The Objecting Creditors do not consent to the Court’s subject matter jurisdiction in this case, even though it is well-established that jurisdiction cannot be conferred by consent, waiver or estoppel.

1 Specialists, Inc. to investigate claims. (Docket no. 82.) Another law firm is unnecessary.

2 Second, as the Objections filed by CAL II and Stillwell Madison LLC also explain, the
3 Application fails to demonstrate any facts that warrant the expense of investigating potential
4 claims. Having pursued multiple Rule 2004 examinations through her current counsel, the
5 Trustee ought to be able to explain those facts. As such, the Application fails to sufficiently
6 “state the specific facts showing the necessity for the employment” of Larry W. Gabriel, The Law
7 Offices of Jenkins, Mulligan & Gabriel, LLP (together “Gabriel”), as required by Federal Rule of
8 Bankruptcy Procedure 2014(a).

9 Third, the Application does not specify whether Gabriel has agreed to handle appeals
10 relating to litigation filed by him on behalf of the Trustee.

11 Fourth, the Trustee has not demonstrated that she was unable to hire special litigation
12 counsel on a typical contingency basis rather than under the proposed hybrid structure or that she
13 even made any effort to do so.

14 Fifth, the hybrid fee structure is especially objectionable because it proposes to pay
15 Gabriel on an hourly basis to investigate claims and to then convert the fee arrangement to a
16 contingency structure once litigation is filed. The fact that Gabriel is only willing to undertake
17 the investigation of claims based upon hourly fees suggests a lack of confidence in the potential
18 claims, which warrants a denial of the Application. Moreover, the Trustee provides no estimate
19 of anticipated hourly fees, which could be quite large give that the “Target Parties” to be
20 investigated are lenders, accountants and attorneys.

21 Perhaps most importantly, the hybrid fee structure effectively permits Gabriel to conduct
22 almost all necessary discovery through Rule 2004 examinations and it further permits him to
23 prepare the lawsuits before litigation is filed (presumably with the help of the Trustee’s forensic
24 accountants) based upon hourly fees and then have a right to significant contingency fees after the
25 litigation filed, without the typical attendant burden of discovery in contingency fee cases. The
26 Trustee has agreed to pay Gabriel a relatively-standard contingency fee of 30% of the net
27 recovery, if the case is settled more than 60 days before trial, and 40% of the net recovery
28 thereafter, despite most (if not all) discovery having been compensated on an hourly basis.

1 The definition of “net recovery” accounts for the “hourly fees billed” by deducting them
2 from the gross recovery along with “costs repaid.” That definition is ambiguous for two reasons.
3 First, does the phrase “hourly fees billed” mean the hourly fees billed by Gabriel personnel only
4 (and not forensic accountants) relating to the claims against the defendant who has been sued, as
5 opposed to fees relating to claims against other parties? That will necessitate a careful accounting
6 of hourly fees billed so they can be accurately attributed to each “Target Party.” Second, do
7 deductible “costs repaid” include the cost of the Trustee’s forensic accountants, who presumably
8 will be assisting Gabriel, and the cost of other experts?

9 Assuming a record of fees are carefully kept by Gabriel personnel on a “per Target” basis,
10 deducting those hourly fees billed from the gross recovery before applying the contingency fee
11 rate still does not fairly account for those hourly fees. Assume, for example, that hourly fees
12 incurred in Gabriel investigating claims against a former lender of the Debtor and preparing the
13 complaint total \$50,000 and assume that charges by the Trustee’s forensic accountants in
14 analyzing documents in providing Gabriel litigation support are not deducted from the gross
15 recovery. At that point, after the case has been prepared by Gabriel and the Trustee’s forensic
16 accountants in pre-litigation discovery, further assume that the hypothetical lender then settles
17 early on by paying \$500,000. Ignoring “costs repaid,” the net recovery will be \$450,000 and
18 Gabriel will receive 30% of that, i.e., \$135,000 in addition to being paid \$50,000 in hourly fees
19 and in addition to the forensic accountant’s having been paid, which means a 37% fee.

20 It is not reasonable to argue that Gabriel is taking the risk that a lawsuit will not settle
21 quickly. Again, that’s because pre-litigation discovery done at hourly rates (with the assistance of
22 the Trustee’s accountants) will greatly minimize the fees in a case that does not settle quickly.

23 Nor is it a sufficient answer to argue that the fees will be subject to Court approval. It
24 would be preferable to address the defects in the hybrid fee structure at this time, if expanding the
25 scope of Gabriel’s employment is approved, rather than correcting it after-the-fact when the
26 argument undoubtedly will be made that the Court-approved fee structure was relied upon.

27 **III. JOINDER IN OTHER OBJECTIONS TO APPLICATION**

28 The Objecting Creditors join in the Objection to the Application that was filed by CAL II

on February 28, 2022 (docket no. 1032) and to the Objection to the Application that was filed by Stillwell Madison LLC on February 28, 2022 (docket no. 1032).

IV. CLARIFICATION OF THE PHRASE “DEBTOR’S FORMER...OUTSIDE COUNSEL”

Paragraph 4 of the Application states in part as follows:

Following the Court's rulings, I held discussions with other litigation law firms to ascertain their willingness to undertake the proposed Litigation Lenders representation and requested fee proposals for the representation. As a result of those discussions, I concluded that it would be preferable for Mr. Gabriel, Jenkins Mulligan & Gabriel, LLP (collectively “Gabriel”) to expand its role as special litigation counsel for the purposes of evaluating and, if appropriate, prosecute claims against the Debtor’s Litigation Lenders. In addition, given the institutional knowledge that Gabriel has built up regarding the underlying facts of the Debtor’s business practices, and its continued investigation into those facts, that it would be appropriate and efficient for Gabriel to also evaluate and, if appropriate, prosecute claims against the Debtor’s former accountants and outside counsel (collectively with the Litigation Lenders the “Target Parties”).

(Docket no. 1018, emphasis added.)

ACTS’ counsel contacted the Trustee’s counsel to confirm whether “Debtor’s...outside counsel” meant co-counsel with Girardi Keese on cases or it meant attorneys who actually represented Girardi Keese. The Trustee’s counsel replied by email that the phrase did not include ACTS and “it was intended to mean lawyers who represented Girardi Keese.”

IV. REQUEST FOR HEARING

The Objecting Creditors request a hearing on the Application pursuant to Local Bankruptcy Rule 9013-1(o)(4).

V. CONCLUSION

Based upon the foregoing, the Objecting Creditors respectfully submit that the Application should be denied.

DATED: March 1, 2022

HILL, FARRER & BURRILL LLP

By: /s/ Daniel J. McCarthy

Daniel J. McCarthy
Attorneys for Creditors
ABIR COHEN TREYZON SALO, LLP,
1126 WILSHIRE PARTNERSHIP, and
ROBERT W. FINNERTY

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 300 South Grand Ave., 37th Floor, Los Angeles, CA 90071.

A true and correct copy of the foregoing document entitled (*specify*): **OBJECTION TO CHAPTER 7 TRUSTEE'S APPLICATION TO EXPAND SCOPE OF SERVICES OF SPECIAL LITIGATION COUNSEL, LARRY W. GABRIEL, THE LAW OFFICES OF JENKINS, MULLIGAN & GABRIEL, LLP; JOINDER IN OBJECTIONS OF CALIFORNIA ATTORNEY LENDING II, INC. AND STILLWELL MADISON LLC; REQUEST FOR HEARING** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) March 1, 2022, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) March 1, 2022, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Office of the United States Trustee
915 Wilshire Blvd., Suite 1850
Los Angeles, CA 90017

Elissa D. Miller
333 South Grand Ave., Suite 3400
Los Angeles, California 90071-1406

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) March 1, 2022, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

The Honorable Barry Russell (via overnight mail)
U.S. Bankruptcy Court
Roybal Federal Building
255 East Temple Street, Suite 1660
Los Angeles, CA 90012

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

March 1, 2022

Sonia Padilla

/s/ Sonia Padilla

Date

Printed Name

Signature

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